

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. 12-cv-00487-MOC-DCK

DAVID HOLMES, HERTA S. THEBERGE,
MARGUERITE K. POTTER, and the
MARGUERITE K. POTTER REVOCABLE
TRUST, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A., in its own
capacity and as successor by merger to
BAC Home Loans Servicing, L.P., SEATTLE
SPECIALTY INSURANCE SERVICES,
INC., in its own capacity and as successor in
interest to COUNTRYWIDE INSURANCE
SERVICES, INC., ILLINOIS UNION
INSURANCE COMPANY, and CERTAIN
UNDERWRITERS AT LLOYD'S LONDON,
including all underwriters who underwrote
force-placed wind insurance policies for Bank
of America, as the insured during the
applicable limitations period and LLOYD'S
UNDERWRITERS AT, LONDON,

Defendants.

**DEFENDANT BANK OF AMERICA'S OBJECTIONS TO THE
MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION
AND ORDER ON BANK OF AMERICA'S MOTION TO DISMISS**

Pursuant to Local Rule 72.1, Defendant Bank of America, N.A., individually and as successor by merger to BAC Home Loans Servicing, LP (“Bank of America”) respectfully submits the following Objections to the Memorandum and Recommendation and Order of the United States Magistrate Judge (“Recommendation” or “Rec.”) (ECF No. 126) regarding Bank of America’s Motion to Dismiss the Claims of Plaintiffs David Holmes, Marguerite K. Potter, and the Marguerite K. Potter Revocable Trust Under Rule 12(b)(6) (ECF No. 87). If the Recommendation is adopted, these issues will remain central to the case so addressing the arguments in the Motion to Dismiss now will expedite the ultimate resolution of this case. As grounds for its Objections, and as set forth more fully in the accompanying memorandum, Bank of America states as follows:

FIRST OBJECTION

By solely relying on *Martorella v. Deutsche Bank National Trust Company*, and *Karp v. Bank of America, N.A.*, the Recommendation failed to recognize that these opinions were decided on fundamentally different factual allegations and legal theories than those alleged here.

SECOND OBJECTION

Contrary to the Recommendation’s conclusion, Plaintiffs’ allegations do not state a claim for breach of contract, where their mortgage contracts (i) grant Bank of America the authority to require windstorm insurance in the amount, including replacement cost value, and for the period that it deemed appropriate; (ii) grant Bank of America the authority, if Plaintiffs failed to obtain windstorm coverage, to obtain that coverage on Plaintiffs’ behalf and ensure that that coverage provided continuous protection, i.e. “backdating;” (iii) do not preclude Bank of America from charging Plaintiffs commission for placing insurance that they do not allege they ever obtained or attempted to obtain for themselves.

THIRD OBJECTION

Contrary to the Recommendation's conclusion, Plaintiffs' allegations do not state a claim for breach of the implied covenant of good faith and fair dealing, where Bank of America exercised the broad discretion granted it under Plaintiffs' mortgage contracts by (i) requiring windstorm insurance, which Plaintiffs admit was required, at replacement cost value, which is the same level of coverage Plaintiffs chose for their own hazard insurance; (ii) placing that coverage back to the date of Plaintiffs' lapse in coverage in order to enforce the explicit requirement in Plaintiffs' mortgage contracts that insurance coverage be continuous; (iii) charging Plaintiffs commissions for placing insurance that they never obtained or attempted to obtain, where Plaintiffs do not allege that the cost of such commissions are prohibited by their mortgage contracts or were comparatively or unreasonably high.

WHEREFORE, for the reasons set out herein, in the accompanying memorandum, and in the memoranda in support of the Motion to Dismiss, Bank of America respectfully requests that the Court not adopt the Recommendation and grant Bank of America's Motion to Dismiss.

Dated: May 3, 2013

Respectfully submitted:

/s/ David L. Permut

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itself and as successor by merger to BAC Home
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CERTIFICATE OF SERVICE

I, David L. Permut, certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on May 3, 2013.

Dated: May 3, 2013

/s/ David L. Permut